IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 300.

INDEPENDENT COAL & COKE COMPANY AND CARBON COUNTY LAND COMPANY,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONER, CARBON COUNTY LAND COMPANY.

FRANK K. NEBEKER,
Attorney for Carbon County Land Company.
SAMUEL A. KING,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

AUTHORITIES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 300.

INDEPENDENT COAL & COKE COMPANY AND CARBON COUNTY LAND COMPANY,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONER, CARBON COUNTY LAND COMPANY.

It is the purpose of this brief merely to supplement the able brief filed herein by counsel for the Independent Coal & Coke Company, and the applicable contentions of that brief are adopted by this petitioner.

The opinion of the Circuit Court of Appeals is reported in 9 F. (2d) 517, and is also found at R. 31-35. The opinion of the District Court appears at R. 24.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 21, 1925 (R. 35). The cause is here on writ of certiorari granted March 22, 1926, under authority of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

STATEMENT

By a bill exhibited May 16, 1924, in the United States District Court for the District of Utah, the United States sought a decree declaring the Carbon County Land Company and the Independent Coal & Coke Company to be trustees for the United States as to certain coal lands in Carbon County, Utah, which had been patented to the Carbon County Land Company by the State of Utah on February 10, 1920. The Independent Coal & Coke Company is a transferee of the Carbon County Land Company as to a part of these lands.

Carbon County, Utah, was made a party defendant because of a claim to a portion of the land under a tax sale in 1921 but its claim is not before this court on this record.

The bill alleged in substance the following (R. 1-5):

That during 1901-1904 upon application of the proper officials of the State of Utah, the Secretary of the Interior certified to the State, under grants made to it by the Act of July 16, 1894, c. 138, 28 Stat. 107, the Utah Enabling Act, the lands involved in the instant case.

That the State of Utah executed contracts of sale of these lands to certain named individuals and on January 7, 1907, the United States instituted suit in the United States District Court for Utah against those individuals and the Carbon County Land Company, to which the contracts of sale had been assigned, for the cancellation of those contracts upon the ground that the lands covered thereby were mineral lands, and were known to be such at the time of their selection by the State. After trial that suit resulted in a decree by that court which declared that the United States "is the owner and entitled to the possession" of the lands and that "plaintiff's title thereto be quieted against any and all claims of the defendants or either of them; that said defendants, and each of them have no right, title or interest, or right of possession in or to said premises * * * or to any part thereof; and that the said defendants * * * are perpetually restrained and enjoined from setting up or making any claim to or upon said premises * * * and all claims of said defendants * * * are hereby quieted." (R. 23.) This decree was affirmed. 228 Fed. 451.

That the State of Utah was not made a party to that suit because "it was believed by the plaintiff that the State would leave to the determination of the Courts, the question of right between the Government and those who had misused the agency of the State, in acquiring title to the lands, and conform its subsequent action to that determination."

That the State, however, did not so conform its subsequent action, but on February 10, 1920, issued its patent to said lands to the Carbon County Land Company, the same party to which the contracts of sale had been assigned, relying upon the fact that it had

not parted with the legal title to the lands at the time the decree was entered in the suit referred to. (R. 4.)

That the lands have already been determined to be mineral lands and as such not subject to selection by the State, and that this question is *res judicata*. (R. 5.)

The bill does not charge that there is any connection between the contracts declared to be invalid in the previous suit and the patent from the State to the Carbon County Land Company involved in this suit, but merely alleges that both the contracts and the patent covered the same lands and that the patent was issued to the same party to which the invalid contracts had been assigned.

Separate motions to dismiss the bill were filed by the respective parties (R. 19, Independent Coal & Coke Company; R. 20, Carbon County Land Company). The grounds for each motion were identical, (1) that the bill did not disclose facts sufficient to constitute a cause of action, (2) that the cause of action was barred by the statute of limitations in that suit was not brought within six years from the accrual of the cause of action. Sec. 8, Act of March 3, 1891, c. 561, 26 Stat. 1099; Comp. Stat. Ann. 1916, Sec. 5114.

The motions were sustained (R. 23), and a decree entered dismissing the bill (R. 24).

In its opinion (R. 24) the District Court held:

> "The certification by the Secretary of the Interior of the lands in question to the State of Utah was in legal effect a patent and in my opinion comes within the meaning of the word patent as used in Section 8 of the Act of March 3, 1891.
>
> "The motion of defendants to dismiss will be sustained on the ground that the cause of action alleged in the complaint is barred under the provisions of said section. * * *"

Upon appeal, this decree was reversed except as to Carbon County by the Circuit Court of Appeals and the cause remanded with instructions to permit the defendants to answer. (R. 35.)

SUMMARY OF THE ARGUMENT.

I. The *legal* title to the lands passed to the State of Utah by the certifications made in 1901-1904, and was unaffected by the decree in the first suit.

II. By virtue of the statute of limitations, the legal title of the State had ripened into an impregnable title by the time the State, on February 10, 1920, patented the lands to the Carbon County Land Company.

III. The Carbon County Land Company was not, by virtue of the decree in the first suit, debarred from receiving patent to these lands from the State, in 1920, nor from availing itself of the impregnable title thereby obtained, since the transactions through which it obtained title were not a continuation of, but entirely distinct from, the transactions which were the subject of litigation in the first suit.

IV. The decree in the first suit is not *res judicata* in the present suit.

ARGUMENT.

I.

The Legal Title to the Lands Passed to the State of Utah by the Certifications Made in 1901-1904, and was Unaffected by the Decree in the First Suit.

There can be no question that the *legal* title to the lands involved passed to the State of Utah by virtue

of the several certifications made to it by the Secretary of the Interior in 1901-1904. The certifications were equivalent to patents. Frasher v. O'Connor, 115 U. S. 102, 116; Williams v. U. S., 138 U. S. 514, 516; Curtner v. U. S., 149 U. S. 662, 675; Deweese v. Reinhard, 165 U. S. 386, 390.

That this *legal* title of the State was not drawn in question in the first suit nor affected by the decree therein appears to be conceded by the allegations of the bill in the instant case. In paragraph 5, (R. 4) it is set forth that the State was not made a party to the first suit because the United States believed it would conform its subsequent action to the determination made in that suit by the courts. This statement can mean nothing else than that the United States expected the State to reconvey to it the *legal* title upon the successful conclusion of the above mentioned suit.

The legal title being in the State it could not, of course, be divested in a suit to which the State was not a party. The United States merely claims that it has the equitable title as it alleges "that at all times the title to said lands has been equitably in the United States." (Bill, par. 10, R. 5.) In other words, it is in effect admitted that the legal title was not affected by the previous suit and is still outstanding.

II.

By Virtue of the Statute of Limitations the Legal Title of the State Had Ripened Into an Impregnable Title by the Time the State on February 10, 1920, Patented the Lands to the Carbon County Land Company.

The certifications of these lands to the State of Utah were made during the years 1901-1904.

Section 8 of the Act of March 3, 1891, *supra*, provides:

> "Suits by the United States * * * to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

The effect of the statute was to make good the title conveyed by the United States. U. S. v. Chandler-Dunbar Water Power Company, 209 U. S. 447; U. S. v. Whited & Wheless, 246 U. S. 552, 563.

Obviously the decree in the first suit against the Carbon County Land Company did not affect the title of the State as the State was not a party to that suit. That decree, it is true, as to the parties to the suit, adjudicated the lands to be mineral in character but that did not deprive the State of such title as it then had and that title was such as would, and did, ripen into a good title by operation of the statute of limitations, regardless of the character of the lands or the means by which the State procured title. Stockley v. U. S., 260 U. S., 532, 542, 543. At any time within six years from the dates of the certifications to the State the United States could have brought suit to annul the certifications and to regain title. Burke v. Southern Pacific R. R. Co., 234 U. S. 669, 692, 693. Not having seen fit to do this, the certifications, after the lapse of the statutory period, became conclusive. That is the very object of the statute. Cramer v. U. S., 261 U. S. 219, 233, 234; U. S. v. Winona & St. Peter R. Co., 165 U. S. 463.

In the Winona case, speaking of this statute of limitations, the court said (p. 476):

> "Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was * * * open to sale, and conveyance through the land department."

The purpose of this statute of limitations was said by this court in U. S. v. Whited & Wheless, *supra*., to be to "promote prompt action for annuling patents where cause therefor was believed to exist, and to make titles resting upon patents dependably secure when the period of limitation should expire." It was "that patent titles might be made secure" (pp. 562, 563).

And in Cramer v. U. S., *supra*, the court said that the object of the statute was "to extinguish any right the *Government* may have in the land * * *."

It is true, the statute does not expressly refer to suits to annul titles other than titles conveyed by patent, but titles conveyed by certification are clearly within the intent and purpose of the Act. U. S. v. Whited & Wheless, *supra*. Under the well established practice of the Land Department, lands selected by a State are conveyed to the State, not by patent but by certification, and as shown above such certification is equivalent to a patent. As this court said in Shaw v. Kellogg, 170 U. S. 312, 351,

> "* * * the significance of a patent is that it is evidence of the transfer of the legal title. There is no magic in the word 'patent' or in the instrument which the word defines. By it the legal title passes, and when, by whatsoever instrument, and in whatsoever manner, that is accomplished, the same result follows as though a formal patent were issued."

It was contended in that case that the ruling in Barden v. Northern Pacific Ry. Co., 154 U. S. 288, was not applicable because in the Barden case a patent was involved, but no patent had been issued in the Shaw case. The court expressly rejected the contention.

In U. S. v. Winona & St. Peter R. Co., *supra.*, the United States sued to recover lands which had been certified to the State of Minnesota for the benefit of the railroad company. In considering the equities of the company by reason of the long lapse of time since certification, this court referred to the statute of limitations here involved and while holding it not applicable because suit had been brought within the time prescribed, it did say respecting it and another statute (p. 476) "we only refer to them as showing the purpose of Congress to uphold titles arising under certification or patent."

So far as the applicability of the statute is concerned, manifestly there is no logical ground for distinguishing between certification and patent. As the purpose of the statute was to make good and to make dependably secure titles conveyed by the United States, it is entirely immaterial how such titles are evidenced. As was observed in Shaw v. Kellogg, *supra.*, "there is no magic in the word 'patent' " and when by whatsoever instrument the title passes, the same result follows as through a formal patent were issued.

The Circuit Court of Appeals held that the statute of limitations is not applicable because the instant suit is not an attack on the certifications, but is an acceptance of them. We find no basis for this view. When the United States discovered that known coal lands had been certified to the State of Utah as a result of fraud practiced, it was entitled to disaffirm the trans-

action and recover the lands, or it might have elected to affirm the transaction and recover damages for the fraud; but it could not do both. These remedies are inconsistent; that to recover the lands is founded upon a disaffirmance, and that to recover damages is founded upon an affirmance of a voidable transaction. U. S. v. Oregon Lbr. Co., 260 U. S. 290, 294, 295.

The basis of the first suit was the fraud which had been perpetrated upon the United States whereby the title to the land had been secured from it. The relief sought was the cancellation of the *contracts* which the State had entered into for the sale of the lands.

In this present suit, what is sought is the divesting of the Carbon County Land Company of the title which it now has under the *patent* from the State of Utah.

The Court of Appeals apparently was misled into considering the present suit as proceeding upon the theory of acceptance of the certifications by the fact that the relief prayed for was "that the defendant be adjudged and decreed to hold whatever title they have to the said lands in trust for the plaintiff." (R. 5)

The basis for suits such as this is that the *equitable* title has, because of the fraud, never left the party defrauded; that he is entitled to recover the *legal* title, which was unlawfully obtained and being successful in the suit, this *legal* title is reunited with the *equitable* title in him. Northern Pac. Ry. Co. v. McComas, 250 U. S., 387, 390; Cf. Byron v. U. S., 259 Fed. 371; Bradford v. U. S., 222 Fed. 258.

When the United States brought the first suit in avoidance it did not recognize the Carbon County Land Company as having the equitable title to the lands. It could not have admitted equitable title in the

company without putting itself out of court for the whole case proceeded upon the theory that the equitable title had never left the United States. The equitable title could not be in both the United States and the company. The United States in that suit was really quieting its equitable title against the clouds cast on it by the voidable *contracts* then under consideration.

This was also the theory of the Williams case upon which the first suit involving these lands was patterned. This court in that case stated the scope of the allegations of the bill to be "that the lands were improperly certified to the State; that in equity it had no title, and its contract with appellant transferred nothing to him; and the prayer was for the cancellation of the contract * * * and an adjudication that the appellant had no title or interest in such lands." 138 U. S. at 515.

In the present suit, the government's case proceeds upon the same theory—that equitable title still remains in the United States—and the relief sought is the setting aside of the legal title which in 1920 vested in the Carbon County Land Company under the State's patent, and the reuniting of that legal title with the equitable title which at all times remained in the United States. The difficulty that now confronts the Government is that its equitable title has been extinguished by the operation of the statute of limitations, and the fraud which formed the basis of the first suit has, so to speak, been blotted out. As the bill in this suit does not charge that the fraud relied upon in the first suit had any connection with the transaction in 1920, whereby the Carbon County Land Company obtained a patent from the State, it follows that there is no fraud upon which a trust can now be predicated.

It is to "stick in the bark" to say that in seeking in this suit to acquire such title as passed to the Carbon County Land Company, the United States acquiesces in or accepts the certification of the Secretary and confirms the title thereunder, because that assertion is diametrically opposed to the avowed purpose of the present suit, as appears from the allegation of the bill "that at all times the title to said lands has been equitably in the United States." (Par. 10, R 5). The prayer of the bill calls for the complete annihilation of the title deraigned from the certifications, and a decree granting the relief prayed for would not leave a vestige or trace of title in the Carbon County Land Company or its grantee.

If the statute does not give repose to titles as against suits such as this, then the entire effect of the statute is merely to require a slightly different form of action, after the statute has run, in order to accomplish the same purpose as would be accomplished by a suit to annul a patent brought within the statutory period.

In the brief of the learned Solicitor General in opposition to the petition for certiorari herein, the argument was made that inasmuch as the statute of limitations had run by the time the decree was rendered in the first suit the Carbon County Land Company could have pleaded that fact and that the decree quieted title as against any claim of title by virtue of the statute. The Carbon County Land Company, however, could not have pleaded the statute, first, because it did not have or claim to have the legal title, and secondly, the statute had not run at the time that suit was commenced.

During all the time of the pendency of the first suit the State of Utah held the *legal* title. The Carbon County Land Company did not obtain the *legal* title until February, 1920.

As the effect of the statute of limitations when it becomes operative, is to confer the *equitable* title upon the holder of the *legal* title it is obvious that the Carbon County Land Company could not have availed itself of the statute in the first suit, and could not have raised any issue based on the statute by any allegation it was then in a position to make.

III.

The Carbon County Land Company was not, by Virtue of the Decree in the First Suit, Debarred from Receiving Patent to These Lands from the State, in 1920, nor from Availing Itself of the Impregnable Title Thereby Obtained, Since the Transactions Through Which It Obtained Title, Were not a Continuation of, but Entirely Distinct from, the Transactions Which Were the Subject of Litigation in the First Suit.

The ultimate proposition sought to be established in what immediately follows is that the patent issued by the State of Utah to the Carbon County Land Company on February 10, 1920, conveyed good title.

The test of this proposition is whether the State, on February 10, 1920, had good title to convey, and if it did, then were there any facts present which had the effect of transforming the perfect title of the State into a bad title or a title in trust in its grantee.

That the State had good title to convey is a proposition about which there can be no doubt. The legal title had reposed in the State for over sixteen years during which time the United States had made no effort to annul or set aside that title. The present suit, indeed, is the only attempt ever made by the Gov-

ernment to annul or to regain the legal title. Let us suppose that the United States had brought suit against the State in 1920 prior to the conveyance of the lands by the State to the Carbon County Land Company. What would have been the result? The court would have been bound to hold that the statute had run, that the Government's title had been entirely extinguished, and that the State had a complete and unimpeachable title by virtue of the statute of limitations "under the benign influence" of which the certifications became "conclusive as a transfer of the title." The corollary of this proposition is that in the absence of fraud against the United States in procuring the patent that was issued to it by the State on February 10, 1920, the Carbon County Land Company acquired title of the same quality as the State then had. The United States does not claim that there was fraud in that transaction, but merely asserts in its bill that in 1901-1904 the assignors of the Carbon County Land Company, in a separate and distinct transaction, had committed fraud in procuring the certification of the lands to the State. It seems to be the theory of the bill that once a party is adjudged to be guilty of fraud in securing title to land he is forever barred from obtaining title thereto. Of course, the entire aspect of the case would be different if the bill in this case had alleged that the fraud involved in the transactions in 1901-1904 was the basis or became a constituent element of the transaction in 1920. We are not asserting that the Government might not have proceeded as it did if the Carbon County Land Company, after the decree in 1914, had persisted in its then existing contracts with the State for the purchase of the lands and had obtained the patent in fulfill-

ment of those contracts. But, as stated, the bill in this case does not allege that the transaction here involved, that is, the sale in February, 1920, is the same or was in pursuance of the same transactions passed upon by the decree in the first suit. Not even by inference can it be said that the bill contains such allegation. In paragraph 6 (R-4) the bill alleges that the State of Utah has not seen fit to conform its action to the determination made in the first suit but "on the contrary * * * the State issued its patent to said lands to the Carbon County Land Company, a corporation, the same party to which said contracts of sale had been assigned * * *".

Those contracts were cancelled by the decree in that suit and there is no allegation that either the State or the Carbon County Land Company thereafter attached any importance to them or recognized them in any way. As appears from the opinion of the Circuit Court of Appeals in the first case, which is made an exhibit to the bill in the present suit, these contracts called for the payment of $1.50 per acre on ten years time (R-12) upon the basis that the lands were non-mineral. The transaction in 1920, on the contrary, involved the purchase of the lands at $100 per acre. Thus, it is seen that in addition to the fact that there is no allegation that the two transactions were related, it affirmatively appears that they were separate and distinct. Since that is the case it cannot be said that the Carbon County Land Company has flouted the decree in the first suit. On the contrary it has suffered all of the consequences incident to that decree and has proceeded in strict observance of it.

IV.

The Decree in the First Suit is not Res Judicata in the Present Suit.

The first suit was brought to cancel the *contracts* which the defendants therein had with the State of Utah and to remove the clouds cast thereby upon the Government's equitable title to the lands. It was predicated, as we have seen, upon the fraud whereby the *legal* title had been secured from the United States.

The present suit seeks the divesting of the *legal* title and involves the transaction between the State and the Carbon County Land Company which resulted in the issuance of the patent to the latter, in February, 1920. No fraud is charged as to this transaction.

This later transaction is, as has been shown, entirely distinct from the contracts which were the subject of the first suit. As a different transaction, and a different title is involved in this suit than that which was involved in the first suit, the claim or demand is not the same. The judgment in the first suit is not, therefore, *res judicata* as the subject-matter of that suit is entirely different from that in this suit. Whenever the claim asserted in the first suit is different from that asserted in the later suit the decree in the first case is *res judicata* only as to matters which the decree actually decides, but not as to matters which might have been but were not pleaded. Cromwell v. Sac County, 94 U. S. 351; Virginia Carolina Chemical Co. v. Kirven, 215 U. S. 252; Troxell v. D. L. & W. R. R. Co., 227 U. S. 434; Bates v. Boslie, 245 U. S. 520; United Shoe Machinery Corp. v. U. S., 258 U. S. 451.

The rule that a defendant in a petitory action must plead all the titles under which he claims to be owner,

and that a final judgment rendered in favor of the plaintiff may be pleaded as *res judicata* against any title which the defendant was possessed of at the time, (Black on Judgments, 2nd Ed. Vol. 2, Sec. 755) can have no application here, for the Carbon County Land Company did not have legal title when the first suit was litigated.

Having later obtained the legal title, it is entitled to assert it and to rely upon it in defense of this later suit, unembarrassed by the judgment in the first suit.

A judgment is not conclusive of any question which, from the nature of the case or the form of action, could not have been adjudicated in the case in which it was rendered. Ash Sheep Co. v. U. S., 252 U. S. 159, 170.

CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed and that of the District Court, dismissing the bill, should be affirmed.

Respectfully submitted,

Samuel A. King,
Of Counsel.

Frank K. Nebeker.
Attorney for
Carbon County
Land Company